Filed 6/5/09 Ryan W. v. La Habra City School Dist. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RYAN W.,	
Plaintiff and Appellant,	G040704
v.	(Super. Ct. No. 07CC06662)
LA HABRA CITY SCHOOL DISTRICT,	O P I N I O N
Defendant and Respondent.	

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Taylor & Ring and David M. Ring for Plaintiff and Appellant.

McCune & Harber and Kristine J. Exton for Defendant and Respondent.

* * *

Plaintiff Ryan W. appeals from a judgment dismissing his negligence action against defendant La Habra City School District entered after the trial court granted defendant's motion for summary judgment. He contends the evidence opposing the motion created triable issues of material fact on whether defendant negligently hired and supervised a teacher who sexually molested him. We hold the trial court properly concluded plaintiff failed to make a sufficient prima facie showing that a triable issue of material fact exists as to his negligence claims against defendant and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Hugh Scott Wilson, a credentialed school teacher, taught in the Ontario-Montclair School District in the 1990's. Jill Hammond, the principal at the school where Wilson worked, described his classroom as "out of control." In February 1998, Wilson resigned from his job after being told that if he did not do so, the district would fire him.

Wilson applied for a job with defendant. His application represented he had never been convicted of a felony or misdemeanor. In addition, Wilson signed an acknowledgment that he knew about the requirements for reporting child abuse. Defendant conducted an independent criminal background check of Wilson that did not reveal any misconduct of a sexual nature by him. Wilson's application also noted he had been asked to resign from his teaching position with the Ontario-Montclair School District, explaining "I had a very difficult . . . grade," and "[a]fter discussions with [Hammond and a district assistant superintendent] it was decided I should resign . . . ."

Tim Harvey, one of defendant's assistant superintendents, interviewed Wilson. While acknowledging the mid-year firing of a teacher is highly unusual and that, had he known about it, he would have pursued the issue during the interview, Harvey denied being aware of Wilson's prior forced resignation from the Ontario-Montclair

School District. However, Harvey also testified this issue would be only one factor in deciding whether to hire a teacher and would not automatically disqualify an applicant.

Harvey claimed the process of hiring a teacher "typically" involved calling references either before or after interviewing an applicant. Hammond testified "someone contact[ed] me" about Wilson, but she could not recall if it was "La Habra or another district." She testified the district "ask[ed] . . . about any concerns that I had" and she "shared . . . the concerns I had with [Wilson's] classroom management and lesson planning or curriculum instruction . . . ."

Defendant hired Wilson to teach at Washington Middle School just before the 1999-2000 school year began. He remained there until arrested for child molestation at the beginning of the 2006-2007 school year. In January 2007, Wilson pleaded guilty to four counts of committing lewd acts on a minor and eight counts of oral copulation with a minor, admitting the offenses occurred between January 1999 and July 2005.

Plaintiff attended Washington Middle School during the 1999-2000 and 2000-2001 school years. He described his relationship with Wilson during the first year as normal student-teacher interaction. Plaintiff testified he did not notice any type of sexual overture by and between Wilson and any other student.

The second year, plaintiff and Wilson began sending each other e-mails using personal e-mail addresses. Wilson also gave plaintiff a ride home from school on several occasions. However, plaintiff admitted in his deposition that Wilson never touched him in a sexual manner during the car rides or engaged him in sexual discussions or innuendo. Plaintiff also did not know if any school administrator or other teacher witnessed Wilson giving him a ride home.

The e-mail messages eventually became sexual in nature. Then, on one occasion at school, Wilson rubbed and caressed plaintiff's leg and rubbed his chest. When plaintiff arrived home later that day, he had an e-mail from Wilson stating, in part,

"I had a good time," and "When I stood up, I was wet all over my leg." Plaintiff responded that he did not want this conduct to occur again and Wilson stopped e-mailing him. Plaintiff admitted Wilson never threatened him or restricted his ability to discuss the e-mails or physical contact with anyone.

The first time plaintiff notified anyone about his encounter with Wilson occurred in an August 2006 e-mail plaintiff sent to the school's principal. The next year, he sued both defendant and Wilson. The single cause of action against defendant alleged the district "breached its duty to properly and adequately investigate, hire, train, and supervise Wilson as a teacher . . . ." Defendant answered the complaint and moved for summary judgment, in part, arguing plaintiff could not establish a triable issue of fact existed as to the elements for a claim of negligence against it.

The trial court granted the motion, concluding "[d]efendant . . . had an affirmative duty to take all reasonable steps to protect its students, including properly vetting the teachers it hires, [but] did not have a duty to further investigate . . . Wilson when it hired him because there was no evidence that it was foreseeable that Wilson posed [a] risk of harming his students, much less sexually abusing them," and "even if [d]efendant" breached "a duty to investigate further, its failure to do so was not the proximate cause of [p]laintiff['s] . . . injuries . . . ." The court also concluded "[t]here is also no triable issue of fact regarding negligent supervision," because "[d]efendant . . . was not aware of the contacts between [p]laintiff . . . and . . . Wilson; [and] the complaints it received about Wilson involved his inability to control his classroom and students."

DISCUSSION

1. Standard of Review

Summary judgment is appropriate where "all the papers submitted show

that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 555.) The party seeking summary judgment has the burden of persuading the court that the foregoing standard has been met. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1407.)

"A three-step analysis is employed in ruling on motions for summary judgment. First, the court identifies the issues framed by the pleadings. Next, the court determines, when the moving party is the defendant, whether it has produced evidence showing one or more of the elements of the cause of action cannot be established or there is a complete defense to that cause of action. If the defendant does so, the burden shifts to the plaintiff to show the existence of a triable issue of material fact as to that cause of action or defense. [Citation.]" (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1373.)

Each party's burden is "to make a prima facie showing of the nonexistence [or existence] of any triable issue of material fact . . . ." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Id.* at p. 851.) "Where, as here, the burden of proof at trial is by a preponderance of the evidence, the defendant must 'present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not . . . .' [Citation.] If the defendant carries this burden, the burden of production shifts to the plaintiff 'to make a prima facie showing of the existence of a triable issue of material fact.' [Citation.] The plaintiff must present evidence that would allow a reasonable trier of fact to find the underlying material fact more likely than not. [Citation.]" (*Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1326.)

"In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party. [Citation.]" (*LLP Mortgage v. Bizar* (2005) 126 Cal.App.4th 773, 776.) "'All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. [Citation.]' [Citation.]" (*Ibid.*) On appeal, an order granting the motion is reviewed de novo. (*Susag v. City of Lake Forest, supra,* 94 Cal.App.4th at p. 1408.)

2. Defendant's Statutory Liability

The first issue presented is defendant's claim plaintiff "failed to identify statutory authority to bring a negligence cause of action" against it.

"Under the California Tort Claims Act (Gov. Code, § 810 et seq.), 'a public entity is not liable for injury arising from an act or omission except as provided by statute. [Citations.]' [Citation.] Thus, in California, 'all government tort liability must be based on statute [citation].' [Citation.]" (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932, fn. omitted.) As applicable here, Government Code section 820, subdivision (a) generally declares "a public employee is liable for injury caused by his act or omission to the same extent as a private person" and, under section 815.2, subdivision (a), "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (See also *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1460-1462.)

In *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, the Supreme Court held a school district cannot be held vicariously liable for a teacher's sexual molestation of a student, but liability may be imposed where "its own direct

negligence is established . . . ." (*Id.* at pp. 441, 447-452; see also *Kimberly M. v. Los Angeles Unified School Dist.* (1989) 215 Cal.App.3d 545, 548-549.) Relying on *John R.*, subsequent cases have held "claims against school districts premised on their own direct negligence in hiring and supervising teachers may be pursued. [Citation.]" (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1855; see also *Steven F. v. Anaheim Union High School Dist.* (2003) 112 Cal.App.4th 904, 909 ["The only way a school district may be held liable must be 'premised on its own direct negligence in hiring and supervising the teacher'"].)

Therefore, defendant's no statutory liability defense lacks merit.

3. Scope of a School District's Liability for the Wrongful Acts of its Employees

"The elements of a cause of action for negligence are (1) the existence of a legal duty to use due care; (2) a breach of that duty; and (3) the breach as a proximate cause of the plaintiff's injury. [Citation.] 'As a practical matter, these elements are interrelated, as the question whether an act or omission will be considered a breach of duty or a proximate cause of injury necessarily depends upon the scope of the duty imposed . . . . [Citations.]' [Citation.]" (*Federico v. Superior Court (Jenry G.)* (1997) 59 Cal.App.4th 1207, 1210-1211.)

Generally, "one owes no duty to control the conduct of another, nor to warn those endangered by such conduct" unless "'(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.' [Citations.]" (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203.) Case law has established "a special relationship is formed between a school district and its students so as to impose an affirmative duty on the district to take all reasonable steps to protect its students." (*Rodriquez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 715.)

In the employment context, "[a]n employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citation.]" (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565.) "[A]s defined by California authority . . .," this duty "is breached only when the employer knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons in *light of the particular work to be performed.*" (*Federico v. Superior Court (Jenry G.), supra,* 59 Cal.App.4th at p. 1214; see also *Roman Catholic Bishop v. Superior Court, supra,* 42 Cal.App.4th at p. 1565.) Thus, "if individual District employees responsible for hiring and/or supervising teachers knew or should have known of [a teacher's] prior sexual misconduct toward students, and . . . that he [or she] posed a reasonably foreseeable risk of harm to students under his [or her] supervision, . . . the employees owed a duty to protect the students from such harm. [Citations.]" (*Virginia G. v. ABC Unified School Dist., supra,* 15 Cal.App.4th at p. 1855.)

4. The Order Granting Summary Judgment to Defendant

There is no dispute defendant owed the students of the district, including plaintiff, a duty to implement hiring practices and supervision methods to protect students from being sexually abused by teachers who presented a reasonably foreseeable risk of molesting them. The issues presented are whether triable issues of fact exist concerning defendant's breach of its duties in employing and supervising Wilson and if its breach of either duty was the proximate cause of plaintiff's injuries. "Generally, whether a defendant was negligent constitutes a question of fact for the jury. [Citations.] However, where reasonable jurors could draw only one conclusion from the evidence presented, lack of negligence may be determined as a matter of law, and summary judgment granted." [Citation.]" (*Federico v. Superior Court (Jenry G.), supra,* 59 Cal.App.4th at p. 1214.)

As for negligent hiring, plaintiff argues defendant "never called the prior school district where Wilson taught to learn why Wilson had been forced to resign in the middle of the school year," and "[g]iven this obvious 'red warning flag'" defendant "was reasonably required to do more than simply interview the candidate and perform a criminal background check." This argument is incorrect. Defendant's employment application required Wilson to affirmatively state whether or not he had ever been convicted of a felony or misdemeanor, and the background check specifically sought to determine if there was any misconduct of a sexual nature in Wilson's past. Defendant also required Wilson to acknowledge in writing that he knew about the requirements for reporting child abuse.

Plaintiff argues defendant never contacted the Ontario-Montclair School District about Wilson's prior employment. This argument is not entirely correct. Harvey testified that his normal procedure would have involved contacting a job applicant's references. Hammond testified a school district contacted her about Wilson, and she "shared" her "concerns" about his "classroom management and lesson planning or curriculum instruction . . . ." In any event, Harvey claimed Wilson's forced, mid-year resignation from his prior teaching job, while significant, would not have automatically disqualified his employment by defendant. Plaintiff presented no further evidence that a more detailed review of Wilson's prior employment history would have uncovered evidence he had sexually molested students or was a threat to do so.

Concerning negligent supervision, plaintiff conceded defendant distributed materials addressing teacher misconduct to its staff and repeatedly reminded teachers to avoid inappropriate behavior with students. But he argues foreseeability of the particular type of injury presented a factual question and, citing complaints against Wilson by other students and a teacher, he contends defendant "had ample information to conclude that Wilson required a much higher level of supervision which would have prevented [the] abuse."

There is no support for the contention the mere knowledge of Wilson's inability to control his classroom rendered it foreseeable that he might sexually abuse students. Liability may be imposed on defendant for Wilson's molestation of a student only if it "knew or should have known of [Wilson's] prior sexual misconduct toward students . . . ." (*Virginia G. v. ABC Unified School Dist., supra,* 15 Cal.App.4th at p. 1855.) This is the general rule throughout the United States. (Annot., Liability, Under State Law Claims, of Public and Private Schools and Institutions of Higher Learning for Teacher's, Other Employee's, or Student's Sexual Relationship with, or Sexual Harassment or Abuse of, Student (2001) 86 A.L.R.5th 1, § 2[a] ["Where the student asserts that the school or its governing body was directly liable, a number of courts have expressed the view that, to impose liability for the negligent hiring, retention, or supervision of a school employee who sexually abused or harassed a student, the employee's sexual misconduct or propensity for sexual misconduct must have been known to or reasonably knowable by school authorities"].)

Granted, there was much evidence reflecting badly on Wilson's professional ability. In her deposition, Hammond cited "students . . . leav[ing] the classroom" without Wilson's knowledge and the "horseplay" between students in the classroom as the reasons she feared for the students' safety. Wilson had also been reprimanded for making a comment at a school assembly that he would bring beer to a student's birthday party. Even after Wilson began teaching at Washington Middle School, a student and another teacher complained about his classroom management.

But while the record reflects Wilson may have been a poor teacher, none of this evidence in any way indicated he was abusing or might sexually abuse students. Plaintiff's claim that *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508 supports the proposition that foreseeability of a specific type of harm is not required is unavailing. *M.W.* involved a sexual assault on a special education student

at school that allowed students to enter the campus 45 minutes before any adults were present to supervise them. The court held it was "reasonably foreseeable that, given the lack of direct supervision in the early morning hours, a special education student, such as the minor, was at risk for a sexual or other physical assault" and rejected the school district's attempt to "distin[guish] between a physical assault and a sexual assault for purposes of foreseeability . . . ." (*Id.* at p. 520.) The complaints about Wilson's classroom management concerned the possibility a student might be injured by another student, not that Wilson might molest a student.

Plaintiff also cites evidence from one student who complained about an inappropriate sexual remark made by Wilson in class. According to the student, during an English lesson, Wilson pointed to his genitalia to explain a comma needed to precede the word "but" in a particular sentence. As the trial court noted, this incident occurred in 2002, the year after Wilson allegedly molested plaintiff. Furthermore, it is difficult to derive from this single inappropriate comment made in front of an entire classroom that Wilson might engage in sexual misconduct with an individual student.

Plaintiff also complains defendant failed to monitor Wilson's use of school computers from which he allegedly sent sexually explicit e-mails. Again, as the trial court properly noted the evidence "only shows that . . . Wilson used the school's computer, not that Wilson used a school e-mail account," to communicate with plaintiff.

Consequently, defendant made a sufficient showing that, in hiring and supervising Wilson, it did not breach its duty to protect students from sexual abuse, and Wilson's employment as a teacher was not the proximate cause of plaintiff's injuries resulting from Wilson's molestation of him. Since plaintiff failed to carry his burden of presenting sufficient evidence to create a triable issue of fact as either of these elements of the negligent hiring or supervision theories, we conclude the trial court properly granted defendant's motion for summary judgment.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.